IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

S.B.Civil Writ Petition No. 5109/2004

(Smt. Manohar Kanwar & Anr. Vs. The State of Rajasthan & Ors)

Date of Order : 10/01/2007

PRESENT

HON'BLE MR. JUSTICE H.R.PANWAR

Mr.S.P.Sharma for the petitioners.
Mr.Rameshwar Dave, Dy. Govt. Advocate for the non-petitioners.
BY THE COURT:-

Reportable

By the instant writ petition under Article 226 of the Constitution of India, the petitioners seek quashing of order Annex.1 dated 10.7.1990 terminating the services of Govt. employee Narain Singh, husband of petitioner No.1 and father of petitioner No.2; to release family pension, death-cum-gratuity benefits and all the service benefits of Narain Singh who said to have been disappeared while in service and nothing has been heard of him for more than seven years and to give compassionate appointment to the petitioner No.2 assuming that his father Narain Singh Govt. servant died while in service.

I have heard learned counsel for the parties.

The facts and circumstances giving rise to the instant

writ petition are that the husband of petitioner No.1 and father of petitioner No.2, Narain Singh Panwar was an employee of the State Govt. serving on the post of Class IV employee as Peon in the Office of Sub Divisional Officer, Phalodi, district Jodhpur. It is averred that after having served about 29 years of regular service, Narain Singh suddenly disappeared from the office on 24.6.1986 while on duty and nothing has been heard of him till date and therefore, he may be presumed to be dead in view of the provisions of Section 108 of the Evidence Act. The petitioner No.1 is the legally wedded wife of the Govt. servant Narain Singh and petitioner No.2 is the son born out of the wedlock and therefore, Govt. servant Narain Singh is survived by his wife petitioner No.1 and four sons including the petitioner No.2. It is also averred that after missing of the Govt. servant Narain Singh, the petitioners who could not obtain education and being poor having no piece of land are put to harness. The petitioner No.1 has been suffering from ailment and is bedridden and there being no means even to get her treated. It is also averred that the non-petitioners have not paid any amount after missing of the Govt. servant Narain Singh even after expiry of almost 18 years from the date of disappearance of the Govt. servant. It was averred that initially Narain Singh was appointed as Waterman in the Veterinary Hospital, Jodhpur on 18.3.1957, thereafter he was transferred to Govt. Middle School, Pachpadra

vide order dated 29.7.1957, he joined the school on 3.8.1957 and thereafter transferred to Jodhpur Treasury Office vide order dated 31.1.1959, thereafter he was transferred from Treasury Office, Jodhpur to the office of Tehsildar, Phalodi on 23.12.1978 and he served in the office of Tehsildar/ Sub Divisional Officer, Phalodi till 24.6.1986. Since 24.6.1986, the Govt. servant Narain Singh has been missing while he was on duty and nothing has been heard of him for more than 18 years and therefore, it be presumed that after expiry of seven years from the date when he was last seen, he is dead in view of provisions of Section 108 of the Evidence Act. It is also contended that an FIR was lodged with regard to the missing of Narain Singh while on duty which was investigated by the CID (CB), however, he could not be traced till date and the non-petitioner terminated his service by order Annex.1 on the ground that Narain Singh Govt. employee is missing and remained willful absent from duty.

A reply to the writ petition has been filed by the non-petitioners and contended that the writ petition suffers from delay and latches as also that the Govt. servant Narain Singh remained willful absent from duty and therefore, after holding domestic inquiry under Rule 16 of the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958 (for short 'the Rules of 1958' hereinafter) he was removed from service.

I have given my thoughtful consideration to the rival

submissions made by the counsel for the parties.

Learned counsel for the petitioners has relied on two decisions of this Court in Smt. Phooli Devi Vs. State of Rajasthan RLW 2002 (4) RAJ. 2338 and Kaushlendra Singh Naruka Vs. The State of Rajasthan and Anr. 2000 (1) WLC (Raj.) 723.

In Smt. Phooli Devi Vs. State of Rajasthan (supra) the husband of the petitioner Nanag Ram Meena who was working as Chokidar vanished while on duty w.e.f. 3.4.1986 after putting in about 15 years of service. A notice was issued in the news papers "Daily Navjyoti" on 11.10.1987 asking him to present himself in the office. The said employee was untraceable since 1986 and has not been heard or traced ever since. After about 10 years of such dis-appearance, his wife petitioner No.1 therein applied to the department that she be given appointment in place of her husband on compassionate ground under the Recruitment to the Government Servants (Dying While in Service) Rules and also claimed family pension, arrears of salary of the husband etc. as also an employment to her son who became major on 24.7.2000. This Court held that the action of the respondents cannot be appreciated to terminate the services of Nanag Ram in 2001 when the petitioner had started giving demand notices for employment of her son when he had attained the age of majority. Such termination of a person who is presumed to be dead after 7 years from April

1986 has no meaning what-so-ever. No charge-sheet can be issued to a dead person, nor his services can be terminated. Any order passed of termination of services of said Nanag Ram Meena had no relevancy in the present circumstances as the date to be taken for awarding the retiral benefits is April 1986.

In Kaushlendra Singh Naruka Vs. The State of Rajasthan and Anr. (supra) the father of the petitioner therein was not heard of for last seven years and deemed to be dead for all legal purposes and a presumption in view of Section 108 of the Evidence Act can be raised that he is dead for all legal purposes. On these premises, this Court held that father of the petitioner therein will be deemed to have died and as he has died while in service of the respondent, he will be deemed to have died in harness. Under these circumstances, this Court directed the respondents to consider the case of the petitioner therein for compassionate appointment and give to him such appointment in accordance with law.

In Smt. Indira Devi Vs. State of Rajasthan and Anr. in S.B. Civil Writ Petition No. 2462/02 decided on 05.10.2006, a similar controversy came to be considered by this Court. In that case, the husband of the petitioner therein was appointed with the respondents on the post of Lower Division Clerk (LDC) on 04.9.1979 temporarily, however, he was made permanent on 19.6.1981. Thereafter he has faced certain transfers from

District Collector, Pali to District Collector, Jodhpur. While in service, on 6.2.1988, the Govt. servant husband of the petitioner therein left his office for home but never reached home and nothing was heard about him and his whereabouts were unknown. The respondents therein dismissed the services of the Govt. employee vide order dated 04.3.1991 on completion of seven years from the date of missing of the Govt. servant. A report was also lodged with the police. However, the Govt. servant could not be traced. This Court quashed the order dated 4.3.1991 dismissing the Govt. servant from service and held that on expiry of period of seven years from 6.2.1988, a presumption should arise with regard to the death of the petitioner's husband with effect from 6.2.1995. The petitioner therein was held entitled to receive family pension w.e.f. 6.2.1989 after expiry of period of one year from the date her husband was last heard of in accordance with the proviso to Rule 268B of R.S.R.

Proviso to Rule 268B of the Rajasthan Service Rules is reproduced hereunder:-

> "Provided further that if a Government servant is unheard of for more than a period of one year the family pension at the rate prescribed under Rule 268 C shall be sanctioned and authorized to the member of his/her family as defined under Rule 268D on submission of an application alongwith Indemnity Bond and Affidavit in the prescribed form and also a copy of F.I.R. lodged with the Police about the dis-appearance of the Government servant. If in any case, the Government servant subsequently re-appears the family pension shall immediately cease to

> be admissible and payable. The amount of family pension already paid to the family, shall be recoverable from the salary of the Government servant."

Even after coming into force of the Rajasthan Civil Services (Pension) Rules, 1996 (for short 'the Rules of 1996 hereinafter), Rule 61 provides admissibility of pension and the second proviso appended to Rule 61 makes an analogous provision to that of Rules 268B of RSR which reads as under :-

> "Provided further that if a Government servant is unheard of for more than a period of one year, the family pension at the rate prescribed under rule 62 shall be sanctioned and authorized to the member of his/her family as defined under Rule 66 (1) on submission of an application alongwith Indemnity Bond and Affidavit in the prescribed forms 16, 16A and 16B and also a copy of the F.I.R. lodged with the Police about the dis-appearance of the Government servant. If in any case, the Government servant subsequently re-appears the family pension shall immediately cease to be admissible and payable. The amount of family pension already paid to the family, shall be recoverable from the salary of the Government servant. The cases in which officials dis-appear after committing frauds, the family pension needs to be sanctioned only on the Government employee being acquitted by the Court of Law or after conclusion of disciplinary proceedings etc. as the case may be."

Learned counsel for the petitioners further submits that the petitioner being village lusting and illiterate could not approach this Court at the earliest inasmuch as she had been regularly representing to the non-petitioners for release of family pension, other service dues and also for appointment of

petitioner No.2 son of the Govt. employee, on compassionate ground, but all in vain. The petitioner has also made representation to the Local M.L.A. vide Annex.9 as also to District Collector, Jodhpur vide Annex.10,13 and 15, as also served a legal notice vide Annex.16 and finding no redressal of the grievance raised by the petitioners, filed the instant writ petition.

The domestic inquiry against Govt. servant Narain Singh was conducted ex-parte and no notice whatsoever was served on the petitioners who are wife and son of the Govt. servant who presumed to have died as nothing has been heard of him for a period of over seven years. Thus, on the relevant date of holding the domestic inquiry/ departmental proceedings, as per the law, the Govt. servant was not alive and therefore, the domestic inquiry conducted by the non-petitioner is in utter disregard to the principles of natural justice and is void in law and consequent removal of the Govt. servant Narain Singh from the service is illegal.

In State of Rajasthan Vs. Phooli Devi and Ors. 2003 (1) WLC (Raj.) 479, Division Bench of this Court in para 12 and 13 of the reports held as under:-

> 12.Rather action of the appellant State in initiating inquiry proceedings after seven years of disappearance of the Government servant and further holding such inquiry proceedings without service of pre and/or post initiation of proceedings

in order to culminate into order of punishment of removal, both are against the constitutional mandate and principles of natural justice. That being so, the learned Single Judge has rightly condemned the action of the appellant State by holding that termination of a Government servant who has not been traced out or not heard of at all or his whereabouts were not known for more than seven years, is no meaning, inasmuch as no charge sheet could be issued to a dead person who by virtue of S.108 of the Evidence Act is presumed to have died.

13. Once the decks are clear that admittedly Nanagram Meena was not heard of at all for more than seven years from the date of his disappearance or missing (3.4.1986), in support of which there is an uncontroverted pleadings of the writ petitions duly supported by an affidavit to the effect that she has not heard of her husband (Nanagram Meena) since 3.4.1986 and for last more than seven years, a presumption would must arise in her favour by virtue of Section 108 of the Evidence Act that her husband has been dead. Thus, viewed, the appellant State therefore have to grant relief to the writ petitioners on the presumption that her husband is dead and she is widow of deceased government servant entitling to grant of relief as sought for in their writ petition. Having scanned the impugned judgment of the learned Single Judge assailed before us, we find no infirmity whatsoever in the said judgment and the learned Single Judge was justified in allowing the writ petition and in granting relief in favour of the writ petitioners as detailed above, which does not warrant any interference by this Court. In the said view of the matter, this appeal is dismissed. No costs."

Similarly in Smt. Shakuntala Kanwar Vs. Union of India and Ors., 2002 (4) WLC (Raj.) 315 while considering the case on similar facts the Division Bench of this Court set aside

the order of the learned Single Judge while holding that the husband of the appellant Smt. Shakuntala is missing since 1983, he could not be traced despite all efforts having been made by the police and her case is fully covered by the Government Decision O.M. No.1/17/86-P & PW, dated the 29th August, 1986, D.P. & P.W. on 25.1.1991 and Memorandum the Government of India, Ministry of Personnel PG & Pension dated 18.2.1993 and therefore directed the non-petitioners to consider the case of Smt. Shakultala Kanwar appellant therein in accordance with the Govt. decision O.M. No.1/17/86 P & PW dated 29th August, 1986 and grant all the benefits which are available to petitioner therein according to the above mentioned Government order with all consequential benefits. The Division Bench observed as under :-

> "By reading this relevant clause 3 of the memorandum, it is clear that a report should be lodged with the concerned Police Station about missing of the personnel and this fact should also come on record that employee have not been traced despite all efforts having been made by the police. In the present matter, both conditions are satisfied. Report has been lodged in police by Commandant 27th Battalion BSF himself about missing of Sayar Singh and this fact is also established that Sayar Singh has not been traced despite all efforts having been made by the police, so we are of the considered view that the case is fully covered by the Government Decision O.M. No. 1/17/86 P & PW dated 29th August, 1986 and the petitioner appellant is entitled for all benefits which are available to the family of Sayar Singh according to above Government Decision. In the writ petition filed by the appellant-petitioner it has been stated that her husband had been wrongly dismissed

> from service from 9.6.83, she has also mentioned that no such copy of order regarding dismissal of service of petitioner's husband was received by the petitioner and entire action of respondents is mere cover up of their mistake. On the other hand, learned counsel for the respondents have also not placed on record copy of any such order of dismissal. The circumstances of this case and facts established by the petitioner clearly shows that it is not a case of desertion by constable Sayar Singh but it is a case of missing of a personnel and therefore, if any such order has been passed about dismissal of Sayar Singh that is absolutely bad in the eye of law. We are also of the view that it is a case of missing of Sayar Singh and therefore, case of the petitioner should be treated as her husband Sayar Singh is missing and his whereabouts are not known since 1983 and under these circumstances provisions given in above mentioned memorandum are fully applicable in the present matter. We are also of the view that if any dismissal order has been passed by concerned Commandant or any Official, such order is absolutely illegal and deserves to be set aside which we hereby do. We are also of the view that this appeal should be accepted and judgment of learned Single Judge should be set aside and the writ petition should also be accepted."

Section 108 of the Evidence Act deals with burden of proving that person is alive who has not been heard of for seven years provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. Thus, Section 108 of the Evidence Act enables the Courts under the circumstances stated therein to draw the statutory presumption that a man is not alive unless

the contrary is proved by the opposite party.

In the instant case, admittedly Government servant Narain Singh husband of the petitioner No.1 and father of petitioner No.2 vanished and has been missing while on duty on 24.6.1986. This fact has not been disputed by the non-petitioners and therefore, the statutory presumption that the Government servant Narain Singh is not alive can safely be drawn and on such presumption being raised, the petitioners are entitled for the benefits like pension, death cum retirement gratuity, GPF and State Insurance or the other retiral benefits available to the deceased Govt. employee.

A bare reading of order Annex.1 dated 10.7.1990 reveals that a departmental proceeding under Rule 16 of the Rules of 1958 was conducted with the allegation that deceased Narain Singh remained willful absent from duty from 24.6.1986. The order Annex.1 itself speaks that the Government servant Narain Singh is missing right from 24.6.1986 when he went to attend the office and from the office never returned home. The inquiry was held by CIB (CB) on the report lodged, yet he could not be traced and was not found alive. Even the order Annex.1 categorically states at more than one place that the Govt. servant Narain Singh is missing and it was non-petitioner department which lodged the report with the police that Govt. servant Narain Singh is missing. This clearly shows that the

Govt. servant Narain Singh has not remained willful absent and therefore, the entire disciplinary proceeding/ domestic inquiry was conducted against a person who presumed to have died in view of provisions of Section 108 of the Evidence Act. So much so, no notice of any such proceeding was ever served even on the petitioners who are wife and son of the deceased Govt. servant.

As per the proviso to Rule 268B of the RSR and second proviso to Rule 61 of the Rules of 1996 as reproduced herein above makes it clear that the grant of family pension would not await the expiry of period of seven years for raising the statutory presumption under Section 108 of the Evidence Act, but after it is proved that the Govt. servant is missing for more a period of one year as prescribed under Rule 268- C of RSR, the payment of family pension shall be sanctioned and authorised to member of family of missing government servant as defined under Rule 268C on submission of application alongwith affidavit in prescribed form and also a copy of FIR lodged in the police station regarding missing of the Government servant. In the instant case, various representations have been made by the petitioners and the FIR regarding missing of the Government servant was lodged by the employer non-petitioner itself and therefore, it was incumbent upon the non-petitioners to pay family pension in conformity with the provisions of Section

268B & C of the RSR instead of removing the Government servant Narain Singh from service by order Anenx.1. The order of removal is obviously against a person who is not alive.

The controversy involved in the instant is almost similarly to that of the case of State of Rajasthan Vs. Phooli Devi and Smt. Shakuntala Kanwar Vs. Union of India and Ors. (supra). In this view of the matter, the writ petition deserves to be allowed.

In the result, the writ petition filed by the petitioners is allowed. The order Annex.1 dated 10.7.1990 removing the Government servant deceased Narain Singh from service is quashed and on expiry of period of seven years from 24.6.1986 a statutory presumption is raised that the Government servant Narain Singh husband of the petitioner No.1 and father of petitioner No.2 is not alive and is dead w.e.f. 24.6.1993. The petitioners are however, declared entitled to receive family pension w.e.f. 24.6.1987, after expiry of period of one year from the date the Government servant Narain Singh husband of petitioner No.1 and father of petitioner No.2 was last seen and thereafter nothing has not been heard of him for over seven years, in accordance with the proviso to Rule 268B of R.S.R. and grant all terminal benefits to the petitioner No.1 treating her to be a widow of deceased Government servant Narain Singh taking 24th June, 1986 as basis for calculating the terminal benefits and

make payment of the benefits and arrears of family pension together with interest @ 9% p.a. within a period of three months from receipt of certified copy of this order. The respondents are also directed to consider the case of the petitioner No.2 son of the deceased Government servant for appointment on compassionate ground in accordance with law within the aforesaid period of three months. Stay petition also stands disposed of. There shall be no order as to costs.

(H.R.PANWAR),J.

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